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THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MARCUS JOHN INMAN, JR.,

Appellant.

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Appeal from the Superior Court of Washington  
for Lewis County

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Respondent's Brief

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## I. ISSUES

- A. Did the judge violate Inman's due process rights during his Drug Court termination hearing, thereby requiring vacation of the conviction and remand for further proceedings?
- B. Should this Court remand this matter back to the trial court to correct an alleged scrivener's error in the judgment and sentence?

## II. STATEMENT OF THE CASE

Inman was given the opportunity to resolve his seven pending felonies in Lewis County's Drug Court. CP 40-43, 47-55. Inman entered Drug Court on October 21, 2019. CP 47-55. On that date, Inman signed his Drug Court Contract (The Contract). *Id.* The Contract stated Inman's obligations while in the program and the possible sanctions if Inman failed to meet those obligations. *Id.* The Contract specified what substances were prohibited from consumption, use, and possession. *Id.* The Contract also specified the termination procedure and the rights Inman was electing to waive. CP 51-52.

Inman started strong in Drug Court, but the momentum did not last. CP 59-69. Once Inman progressed to Phase II, he began to rack up violations. CP 59-88, 93. The State filed a petition to terminate Inman from Drug Court in December 2020, outlining Inman's various violations of The Contract. CP 95-98. The trial court denied the State's petition and put Inman on a 90-day strict compliance contract (Behavior Contract). CP 104, RP 10-12. Again, Inman could not comply.

Inman failed to adhere to the terms on The Contract and Behavior Contract therefore; the State filed a second petition to terminate Inman from Drug Court in January 2021. CP 110-14. This violation stemmed from Inman being found in possession of what appeared to be a carbon dioxide (CO<sub>2</sub>) or nitrous oxide (N<sub>2</sub>O) cartridge. CP 112. Inman admitted to Drug Court Compliance Officer David Albright that the canister was a CO<sub>2</sub> cartridge for his airsoft gun. *Id.* The State asserted that possession of the canister

was a violation of The Contract, which prohibited a participant from possessing air duster, other brands, or a canister that could be used by the participant for huffing purposes. CP 49, 113.

The trial court held Inman's termination hearing during a Drug Court proceeding. RP 17-25. Inman did not dispute the facts set forth in the State's petition. RP 17; see also CP 110-14. While the facts were not in dispute, Inman still desired to be a participant in Drug Court and addressed the trial court. RP 17-23. Inman explained to the judge his reasons why he wanted to remain in the program and what he had learned from being in Drug Court. *Id.* Ultimately, the judge terminated Inman from Drug Court. RP 23-24. The judge found Inman was in possession of a canister prohibited by The Contract. *Id.* The matter was set for a stipulated facts bench trial. RP 25.

Inman was found guilty after a stipulated facts bench trial. RP 26-29; CP 118-25. The State dismissed all of the

charged possession counts due to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2020). CP 134. Inman was sentenced to 14 months on Count I and 22 months on Count VII. CP 134. Inman was also sentenced on Lewis County Case Number 20-1-00912-21, a delivery of a controlled substance conviction. RP 33. On 2020 case, Inman was sentenced to 96 months. RP 54. Inman timely appeals. CP 141-49.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THERE WAS NO VIOLATION OF INMAN'S DUE PROCESS RIGHTS; THEREFORE, THE JUDGE'S TERMINATION OF INMAN FROM DRUG COURT WAS PERMISSIBLE.**

The procedure employed by the Lewis County Drug Court during Inman's termination process ensured Inman's due process rights were observed. Contrary to Inman's assertion, there was a factual basis for his termination that was proved by a preponderance of the evidence. See



Appellant's Opening Brief (AOB) 13-16. This Court should affirm.

**1. Standard Of Review.**

A trial court's decision to terminate a drug court participant is reviewed de novo. *State v. Kessler*, 75 Wn. App. 634, 639, 879 P.2d 333 (1994).

**2. Inman Violated The Drug Court Contract By Possessing A Prohibited Canister, Therefore The Trial Court's Termination Of Inman From The Program Was Permissible.**

The State sufficiently proved Inman's violation of The Contract by a preponderance of the evidence. Inman asserts the State failed to prove his noncompliance by failing to produce evidence that CO<sub>2</sub> is a mind or mood altering substance. AOB at 14-16. This is simply not required. The State had to prove Inman was in violation of the terms of The Contract by a preponderance of the evidence, and through the facts Inman admitted to, the State met its burden.

A drug court participant facing termination from the program has “a due process right to have factual disputes resolved by a neutral factfinder.” *Kessler*, 75 Wn. App. at 637. The State has the burden to prove by a preponderance of the evidence that a participant is not in compliance with their drug court agreement. *State v. Varnell*, 137 Wn. App. 925, 974, 155 P.3d 971 (2007), citing *State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984). A drug court participant may not be terminated from the program without, (1) being given “an opportunity to contest the basis of the termination and (2)” the State “creating a record of the evidence relied on to terminate the participant.” *Varnell*, 137 Wn. App. at 930, citing *State v. Cassill-Skilton*, 122 Wn. App. 652, 658, 94 P.3d 407 (2004).

In *Cassill-Skilton*, the defendant entered the drug court program, struggled, and was charged with new crimes in a separate case. *Cassill-Skilton*, 122 Wn. App. at

654. The State made an oral record at a hearing, noting its concern about the new charges and that the State was inclined to terminate Cassill-Skilton from the drug court program. *Ids.* There was another hearing, and again the State asserted it wanted Cassill-Skilton terminated from the program. *Id.* The drug court team discussed the issue, and it was recommended Cassill-Skilton be discharged from the program. *Id.* At a later hearing, the State amended the information and Cassill-Skilton pleaded guilty. *Id.* at 655. Cassill-Skilton was sentenced at a subsequent hearing. *Id.* Nowhere in this process did the State file a termination petition or hold an actual termination hearing. *Id.* at 654-55. The judge also did not explain what evidence they used to base their decision to terminate Cassill-Skilton. *Id.* This Court held Cassill-Skilton was denied due process. *Id.* at 658.

Unlike *Cassill-Skilton*, Inman was not denied due process when the trial court terminated Inman from the

Lewis County Drug Court Program. The State filed a detailed second petition for termination from drug court. CP 110-14. This second petition detailed multiple prior sanctions for violations of The Contract and Inman's failure to make significant progress, despite being in the program for 15 months. *Id.* The State noted that it had previously filed a petition to terminate and that the judge, rather than granting the petition, placed Inman on a Behavior Contract. CP 112-14. The Behavior Contract stated, "I will need to abide by all the rules and further I understand that **ALL** rules apply to me as they do all other Drug Court participants." CP 114 (emphasis original). The termination petition stated:

15. On January 14, 2021, the Defendant was found to be in possession of a canister of air which appeared to be either a carbon dioxide (CO<sub>2</sub>) or nitrous (N<sub>2</sub>O) cartridge. The defendant made a statement to Drug Court Compliance Officer David Albright that the canister was a CO<sub>2</sub> cartridge for an airsoft gun. Paragraph 9 of the Drug Court Contract signed by the Defendant and filed with this Court on October 21, 2019, states, "Any use of air duster

or possession of air duster will be grounds for automatic termination from the program. This includes any other brand ***or canister that could be used for huffing purposes.***” (Emphasis added). Paragraph 3 of the Behavior Contract signed by the Defendant on December 28, 2020, states, “I will submit to random UAs per the UA line and not use or possess any illegal or mind-altering substances. This includes air duster and Kratom.” (See Exhibit “A”).

CP 112-13 (emphasis and quotations original). Therefore, Inman was sufficiently informed of the specific factual allegations regarding his noncompliance and requested termination.

Inman asserts the State failed to prove the violation of The Contract by a preponderance of the evidence, and the judge exercised judicial notice to attempt to fill in the gap in the State’s evidence therefore, improperly inserting his own experience “to reach the conclusion that the canisters contained nitrous oxide.” AOB at 13-14. Inman’s assessment of the termination hearing and the judge’s conduct is inaccurate. Inman neglects the fact he admitted

to the facts in the petition for termination. RP 17. Inman, while quoting the entire statement of the judge earlier in briefing, takes the judge's statement out of context in his argument. AOB at 8, 14; RP 23. The State sufficiently proved, by a preponderance of the evidence that Inman violated The Contract.

The State had to prove Inman violated a provision of The Contract by a preponderance of the evidence. "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." *State v. Arredondo*, 188 Wn.2d 244, 257, 394 P.3d 348 (2017). The State submitted two possible ways that Inman violated The Contract: (1) being in possession of a canister that could be used for huffing purposes, or (2) possessing a mind-altering substance. CP 112-13. The State did not need to prove both allegations for Inman to be terminated from Drug

Court. The State proved Inman was in possession of a canister that could be used for huffing purposes.

There was no factual dispute in this matter. RP 17-18; CP 110-14. At the beginning of the hearing, Inman's attorney states he has reviewed the petition for termination with Inman. RP 17. Inman's attorney next states, "There is no factual disputes with what is contained in the petition...even though he does admit that the canisters were in his car, he wants the Court to know that he hasn't ever used them for anything other than recreational target shooting." RP 17. The judge asked Inman if he agreed with what Inman's attorney had told the judge. *Id.* Inman stated, "Yes, Your Honor." *Id.* The judge then stated, "All right, then I will accept your admissions. And is there anything else the State wants to say?" RP 17-18. The State emphasized it did not matter if the canisters were only CO<sub>2</sub> canisters, "it could still potential be used as an inhalant" and should result in automatic termination. RP 18.

Inman's admission at the termination hearing was that he possessed a CO<sub>2</sub> canister. RP 17-18; see also RP 112-13. The statement in the petition for termination laid out the factual basis, Officer Albright discovered a canister in Inman's vehicle. CP 112. The petition stated the canister could be either CO<sub>2</sub> or N<sub>2</sub>O. *Id.* The petition also stated Inman told Officer Albright the canister was a CO<sub>2</sub> canister. *Id.* This statement was repeated by Inman's attorney at the beginning of the proceedings, adopted again by Inman, and accepted as admission by the judge. RP 17-18.

The possession of a canister that can be used for huffing purposes is a violation of The Contract, and violations of The Contract may lead to termination at the discretion of the judge. CP 48-55. Inman asserts CO<sub>2</sub> canisters are used for airsoft guns, not huffing. AOB at 15. Inman cites to cases from other jurisdictions that discuss pellet and BB guns. *Id.* While, CO<sub>2</sub>'s preferred, and generally designated, use is for things such as canisters



for airsoft guns or dry ice used in a variety of settings; this does not mean CO<sub>2</sub> cannot be used for huffing. The category, “inhalants,” is broad and contains a wide array of gasses, volatile solvents, aerosols, and nitrites. Inhalants Research Report, National Institute on Drug Abuse.<sup>1</sup> Gasoline is substance huffed, but all can agree that its primary use is for fuel source. The same can be said for air duster, nitrites, volatile solvents, and gasses.

Further, one only needs to do a quick internet search and they can find different web forums of people discussing ways to use CO<sub>2</sub>.<sup>2</sup> There is a discussion on a diving forum regarding the feeling of “intoxication” a person feels when

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<sup>1</sup> The Inhalants Research Report can be found on the National Institute of Drug Abuse’s website at: <https://nida.nih.gov/publications/research-reports/inhalants/what-are-inhalants> (last visited 6/30/22).

<sup>2</sup> A thread on Bluelight, a forum used to discuss harm reduction while using drugs, shows one such discussion. “Can huffing CO<sub>2</sub> be dangerous?” can be found at <https://bluelight.org/xf/threads/can-huffing-co2-be-dangerous.702453/> (last visited 6/30/22).

they inhale pure CO<sub>2</sub>. Inhaling CO<sub>2</sub>..., deeper blue.<sup>3</sup>

Therefore, Inman's argument that a CO<sub>2</sub> canister cannot be a canister that can be used for huffing purposes is simply incorrect.

Inman admitted he was in possession of a canister of CO<sub>2</sub>. Inman's possession of that canister is a violation of The Contract. The State was not required to bring in an expert on huffing to explain that CO<sub>2</sub> is a gas that may be huffed. The Drug Court team has training and experience with drugs and drug addiction due to their jobs. Further, it does not require specialized knowledge to know that a person can huff a variety of chemicals or gasses found in canisters. The State had to prove it was probably more true than not that Inman was in possession of a canister of CO<sub>2</sub>

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<sup>3</sup> The discussion thread, Inhaling CO<sub>2</sub>.. can be found on the deeper blue website at:  
<https://forums.deeperblue.com/threads/inhaling-co2.62819/> (last visited 6/30/22).

that could be used for huffing purposes. The State satisfied this requirement and this Court should affirm.

### **3. The Judge Did Not Take Judicial Notice.**

Inman argues the judge impermissibly took judicial notice that the canisters (or cartridge as the judge called them) were nitrous oxide rather than CO<sub>2</sub>. AOB at 16-18. This is not an accurate depiction of what occurred. The judge did not take judicial notice that there was a canister of nitrous oxide. There is no error.

ER 201 governs judicial notice. The rule sets forth the kind of facts a judge may take judicial notice of: “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). The judge may take judicial notice even when a party does not request the judge to do so. ER 201(c). Appellate courts

review questions regarding a judge's taking of judicial notice do novo. *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn. App. 762, 771, 970 P.2d 774 (1999).

The judge here did not take judicial notice that the canisters in question were nitrous oxide. RP 23-24. The judge, while explaining to Inman the reason why he was terminating Inman from Drug Court, did reference a photograph that was not in record and the judge's thoughts about the contents of the photograph. *Id.* The State concedes that occurred. The photograph was likely seen during staffing, as is commonplace during Drug Court. Adult Drug Court Best Practice Standards, Vol I, pg. 22-23, National Association of Drug Court Professionals.<sup>4</sup> This does not excuse failing to include a document that is

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<sup>4</sup> The Adult Drug Court Best Practice Standards, Vol. I, can be found on the NADCP website at <https://www.nadcp.org/standards/adult-drug-court-best-practice-standards/> (last visited 7/1/22).

discussed in the record. The State concedes it is a failure on the State's part for not making that photograph part of the record. Yet, that failure is harmless. The judge's discussion of the photograph is simply that, a discussion, because at the end the judge transitions and states, "So it doesn't really matter what I believe or not; those are items that violate your contract so I am going to terminate you from the program." RP 23-24. Here, the judge is stating, it does not matter if the items are nitrous oxide or CO<sub>2</sub>, either way, it violates The Contract, and the judge is terminating Inman from the program. The judge can do this because Inman admitted to possessing a canister of CO<sub>2</sub>. Therefore, it does not matter, as the judge stated. There was no judicial notice.

Further, contrary to Inman's argument that the judge failed to clearly state the evidence relied upon to find the violation, the judge did explain what evidence he used to base his decision to terminate Inman. AOB at 18-19. It was

the only available evidence. The canisters, as stated above by the judge, in and by themselves violated The Contract. RP 17-18, 23-24; CP 49, 112-13. That is all that was required, and Inman admitted to possession of those canisters. This Court should affirm the judge's termination of Inman from Drug Court.

**B. REMAND IS NOT REQUIRED TO CORRECT A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE.**

Inman requests this Court remand his matter back to the trial court to correct an alleged scrivener's error on his judgment and sentence. AOB at 19-20. According to Inman, due to being sentenced to this matter and the 20-1-00912-21 case at the same time, it is necessary to make a notation on the judgment and sentence in this case that the two sentences are to run concurrent. AOB at 20. This is unnecessary.

Inman was sentenced on his current matter and 20-1-00912-21 on the same date. RP 31-55. Pursuant to the

Sentencing Reform Act, sentences shall run concurrently unless an exception or an exceptional sentencing provision applies. RCW 9.94A.589. A consecutive sentence requires a notation on the judgment and sentence, a concurrent sentence does not. Remand of Inman's matter for additional notations to the judgment and sentence is unnecessary.

#### **IV. CONCLUSION**

Inman's due process rights were not violated during his Drug Court termination process. Inman was given notice of the facts surrounding the violations, given an opportunity to respond, and the trial court articulated why Inman was terminated. The State proved by a preponderance of the evidence that Inman committed the violation. This Court should affirm the trial court's termination of Inman from Lewis County's Drug Court Program. Further, there is no need to remand Inman's matter back to Lewis County Superior Court to fix a

scriveners error on the judgment and sentence, as there is no scrivener's error.

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RESPECTFULLY submitted this 5<sup>th</sup> day of July, 2022.

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